

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002



Date Issued: April 7, 1999

Case No.: 1996-INA-0496

In the Matter of:

BARBARA CHAMBERS CHILDREN'S CENTER
Employer,

On Behalf of:

EKOW AMANKWAA OCRAN,
Alien.

Certifying Officer: Richard Panati, Region III

Appearance: S. Anita Ryan

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

An application was filed on January 4, 1996, by Barbara Chambers Children's Center, Employer, for the position of Preschool Teacher, seeking labor certification for Ekow Amankwaa Ocran, Alien. The duties of the job were described as follows:

Nursery School Attendant-Organizes and leads activities of pre-kindergarten children in nursery school: helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting, and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in such tasks as preparing food and cleaning quarters.

Employer required that applicants have a B.S. degree in Computer Science and three years of experience (AF 50).

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on July 10, 1996 (AF 42-44). The CO changed the occupational title and code of the petitioned job from Preschool Teacher to Nursery School Attendant on the basis of the job description contained in Employer's labor certification application. After stating that the position of Nursery School Attendant requires only 3 to 6 months of combined education training and experience, the CO reasoned that Employer's job requirements as stated in the application are unduly restrictive; that they exceed those defined in the Directory of Occupational Titles (DOT). (20 C.F.R. § 656.21(b)(2)) Employer was advised that it could rebut this finding by submitting evidence that the job requirements arise from a business necessity or by reducing the requirements to those normally required for the job and re-advertising.

Employer, by counsel, submitted rebuttal on July 26, 1996 (AF 33-37). Rebuttal consists of a letter from Employer and argument from counsel. Employer's letter states that it wishes to hire a Teacher, not a Nursery School Attendant; that it could not hire anyone with only 3 to 6 months of experience because federal regulations requires that it hire Teachers with a minimum of 15 college credits; that to assure compliance with the federal regulation it requires that new Teachers have a college degree. Employer stated further that a B.S. degree in computer science is required because the job involves instructing children in the school's computer center. Counsel

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

argued that Employer could not hire a Nursery School Attendant because of the aforementioned Federal regulation; that the position for which certification is being sought is that of a Teacher; that the job duties listed in the Directory of Occupational Titles (DOT) for a Preschool Teacher and Nursery School Attendant are similar; that Employer has clearly indicated in the certification application that it seeks to hire a Teacher.

The CO issued a Final Determination denying certification on August 6, 1996 (AF 33-36). The CO compared the job duties stated in Employer's labor certification application with the job duties stated in the DOT for a Nursery School Attendant² and found that they are identical. The CO also compared the job duties in Employer's application with those of a Preschool Teacher³ and found that they were different. The CO stated that the job duties define the position, not the title that an employer gives to the job. The CO determined that the job being offered by Employer, based on the job duties described in the labor certification application, is Nursery School Attendant, not Teacher.

The CO next questioned the relevancy of a college degree in Computer Science to the performance of the listed job duties and concluded that there is no apparent connection between the two and that the degree requirement was listed for the purpose of qualifying the Alien and excluding U.S. applicants.

The CO also noted that 15 college credits could be obtained in one college semester, which corresponds with the standard vocational preparation of three to six months for a Nursery School Attendant. The CO stated further that according to the Alien's resume, she worked as a preschool teacher before attending college; therefore it does not appear that a college degree is necessary to perform the duties of the offered job; and that Employer's internal decision to require a college degree rather than the 15 college credits required by regulation does not establish a business necessity for the degree requirement. The CO concluded that Employer had not demonstrated a business necessity for job requirements that exceed the normal requirements for the position of Nursery School Attendant.

² 359.677-018 NURSERY SCHOOL ATTENDANT (any industry) alternate titles: child-care leader; child-day-care center worker; day care worker

Organizes and leads activities of prekindergarten children in nursery schools or in playrooms operated for patrons of theaters, department stores, hotels, and similar organizations: Helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting, and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in preparing food and cleaning quarters.

³ 092.227-018 TEACHER, PRESCHOOL (education)

Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school in preschool, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using play equipment. May be required to have certification from state. May be designated Teacher, Child Development Center (education); Teacher, Day Care Center (education); Teacher, Early Childhood Development (education); Teacher, Nursery School (education).

Employer, by counsel, requested administrative-judicial review on September 12, 1996 (AF 1-32).

DISCUSSION

The issues are whether Employer's job offer contains unduly restrictive job requirements and if so, whether a business necessity for those requirements has been demonstrated.

Section 656.21(b)(2) proscribes an employer's use of unduly restrictive job requirements in the alien labor certification process, unless the requirements are adequately documented as arising from business necessity. The Board defined how an employer can document "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*), by showing as follows:

- (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
- (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The labor certification application filed by Employer lists the title of the offered job as Preschool Teacher (AF 50, item 9) while the duties of the job described in item 13 of the application are those of a Nursery School Attendant. Employer contends that it wants to hire a Teacher and not an Attendant, that the degree and experience requirements are not unduly restrictive for a Teacher and even if they are unduly restrictive, a business necessity exists for the Computer Science degree requirement because the Teacher will be instructing children in the use of computers and because Federal regulations requires that Preschool Teachers have at least 15 college credits.

We agree with the CO that it is the description of the job duties and not the job title that defines the position being offered. *Richard Lum*, 94-INA-219 (June 27, 1995); *Hardee's*, 94-INA-218 (June 27, 1995). In this case, the Employer's described job duties are identical to those of the Nursery School Attendant's job described in the DOT. (359.677-018). Therefore, we find that the offered job is for a Nursery School Attendant and not a Teacher. The standard vocational preparation (SVP) for a Nursery School Attendant's position is three to six months of combined experience, education, and training. Accordingly, Employer's job requirements of a B.S. degree and three years of experience are unduly restrictive.

Employer's contention that a business necessity exists for a Computer Science degree because the job involves instructing children in the use of computers is not supported by the record. There is no mention of computer instruction in the job advertisement or in the description of the job duties in item 13 of the labor certification application (AF 55). Therefore, we afford no weight to this contention. We also reject Employer's contention that its internal decision to require a college degree, based on Federal regulations requiring that a teacher have at least 15 college credits, establishes a business necessity for the degree requirement. Employer's preference for a degree does not establish business necessity. Moreover, there has been no showing that the degree requirement bears a reasonable relationship to the occupation of Nursery School Attendant or that it is essential to performing the described job duties in a reasonable manner. In addition, Employer has offered no

creditable explanation as to why a Nursery School Attendant must have three years of prior experience to qualify for a job that normally requires only three to six months of prior education, experience and training.

We conclude that certification was properly **DENIED**..

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

